IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.168 of 1993

Decided on : December 17, 2007

State of H.P. **…Appellant.**

Versus

Vijay Kumar **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

For the Respondent : None.

Surjit Singh, Judge(Oral)

State has appealed against the judgment of the Sessions Court whereby the respondent, who was charged with and tried for offences punishable under Sections 363, 366 and 376 IPC, has been acquitted with the finding that the prosecutrix appeared to have voluntarily gone with the respondent and having had sex with him of her own free will.

2. Allegations against the respondent were that his sister Veena Devi used to learn knitting on a machine from the prosecutrix. On 12th August, 1988, said Veena Devi took the prosecutrix from her village to a place called Tarkwadi and from there she was taken to a place called Ladraur in a temple where a fake marriage with the respondent was performed and thereafter the prosecutrix was taken by the respondent to his house and kept there from 12th August, 1988 to 25th August, 1988 and raped.

Whether reporters of the local papers may be allowed to see the judgment?

3. The matter was reported to the police by the father of the prosecutrix on 24th August, 1988. Thereafter, the police visited the house of the respondent where the prosecutrix was found in his company. Her custody was handed over by the police to her father. During the course of investigation, police took into possession school leaving certificate of the prosecutrix wherein her date of birth is recorded as 12th September, 1973. As per this certificate, the age of the prosecutrix was a little less than 15 years at the time of the incident. Skeleton age of the prosecutrix was also got determined. The Radiologist opined her age to be between 15 to 17 years.

4. We have heard the learned Additional Advocate General and gone through the record.

5. From the record, we find that the following epiphysis of the prosecutrix had fused; (1) head of femur, (2) great trochanter, (3) distal end of femur, (4) proximal end of tibia, (5) distal end of tibia, (6) proximal end of fibula, and (7) distal end of fibula.

6. According to the table showing the age of appearance/ fusion of some of the epiphysis, the above listed epiphysis fuse between 15½ to 18 years in the case of Punjabis. We may add that climatically Hamirpur is similar to the plains of Punjab and prior to the reorganization of the State of Punjab, in the year 1966, it was a part of Punjab State. Now, on the basis of the fusion of the epiphysis, it can legitimately be said that the age of the prosecutrix could have been even upto 18 years. The prosecution examined the Radiologist, namely PW-11 Dr. P.C. Gupta. He stated that his opinion was based on thesis of Dr. Aggrawal and Dr. Pathak. That means the opinion is not based on Modi's work. Normally in this part of the country radiologists depend upon Modi's treatise for determining skeletal age.

7. It is true that there is a school leaving certificate, Ex. P-10, of the prosecutrix, in which her date of birth is recorded as 15th September, 1973. The certificate had not been proved properly, because it was tendered in evidence by PW-5 Mauji Ram, the father of the prosecutrix. It has not come on record, as to what was the basis of this certificate. No doubt, a school leaving certificate has got evidentiary value, but it is not conclusive evidence of age, particularly when the basis of the entry of date of birth, in the school record, is not indicated.

8. From the evidence on record two views are possible with regard to the age of the prosecutrix. One based on the ossification test and the other based on the entry in the school record, copy Ex. P-10. Evidence on record with respect to both the views with regard to age is not conclusive. Therefore, the view favourable to the respondent (accused) is required to be accepted.

9. It is borne out from the evidence on record that even though the prosecutrix was allegedly kidnapped on 12th August, 1988, the report of her having gone missing was lodged only on 24th August, 1988. No explanation for this long delay has been offered by the father of the prosecutrix. Also, we notice that the evidence with respect to the alleged kidnapping of the prosecutrix is self contradictory. According to the testimony of the father of the prosecutrix, as also the FIR lodged by him, the kidnapping took place on 18th, but the prosecutrix herself claims that she had been taken away on 12th August, 1988 by the sister of the respondent. Moreover, we find no evidence that the respondent himself took any active part in the alleged kidnapping of the prosecutrix. Further, the prosecutrix had been taken to Hamirpur on 18th August, 1988 by the respondent, per

prosecutrix's own testimony. She was taken to the Court campus for swearing affidavits about her having married the respondent. She had had the opportunity to complain to others, while in the Court campus, that she had been kidnapped and was being subjected to rape by the respondent. But, she did not complain to anybody. Her conduct is suggestive of her tacit consent for the sexual intercourse with the respondent.

10. The appeal is, therefore, dismissed, being devoid of merit.

(Surjit Singh), J

December 17, 2007(sd) **(Surinder Singh), J**